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In the Supreme Court of the United States

MITCHELL BROS. TRUCK LINES,
a corporation,

Appellant,

v.

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION,

Appellees.

On Appeal from the United States District Court for the District of Oregon

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment of the United States District Court for the District of Oregon, entered on December 20, 1963, dismissing the complaint of Appellant as plaintiff in the Court below which sought to annul, set aside and enjoin a cease and desist order of the Interstate Commerce Commission dated September 27, 1962. The judgment also affirmed the order as entered by the Interstate Commerce Commission. Appellant respectfully submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion and order of dismissal of the District Court for the District of Oregon has not been reported. It is, however, set forth in Appendix A. The opinion of the Interstate Commerce Commission is reported in 91 M.C.C. 267. The challenged portions of this report and order are set forth in footnotes.

JURISDICTION

Appellant as plaintiff brought this action under 28 U.S.C. § 1336, to set aside an order of the Interstate Commerce Commission. The final judgment of the District Court was entered on December 20, 1963, and notice of appeal was filed in that court on February 14, 1964. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253 and § 2101(b). This Court has jurisdiction: *Nelson, Inc.* v. *United States* (1958), 355 U.S. 554.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission under guise of an order purporting to interpret Appellant's motor carrier certificate of public convenience and necessity issued some 23 years earlier has by its order restrictively modified such certificate contrary to the Fifth Amendment of the United States Constitution, § 212 of the Interstate Commerce Act, 49 U.S.C. § 312 and the teachings of this Court in *Nelson* v. *United*

States (1958), 355 U.S. 554, by imposing upon the certificate's commodity description which is cast in generic terms the Commission's so-called "intended use" test for the reason that the words of the certificate do not fairly lend themselves to any intended use connotation.

2. Whether an order of the Interstate Commerce Commission is so vague, uncertain and impractical of obeying that it deprives Appellant motor carrier of its property without due process of law as forbidden by the Fifth Amendment so far as the order requires the plaintiff to affirmatively establish at the peril of having its certificate revoked, the intended use of *electric cable* when picking it up at place of manufacture for transportation to a consignee whose name on the freight bill appears to be that of a power company. This, because the Commission has determined that in such a situation the naming of a power company as consignee of the shipment gives "some notice" to the motor carrier that it is "highly unlikely" that the *electric cable* is not intended to be used in the repair or construction of a building.

3. Whether the Interstate Commerce Commission has exceeded its power and violated the Fifth Amendment by ordering that the Appellant motor carrier cannot transport "construction materials" if their intended use at the time of transportation is found to be for the *repair* as distinguished from the original *construction* of a structure?

STATUTES INVOLVED

Section 212 of Part II of the Interstate Commerce Act, Chapter 498, 49 Stat. 555, as amended, 49 U.S.C. § 312 which reads in part:

> ". . . *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereby willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 304(c) of this title, commanding obedience to the provision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: . . ."

STATEMENT OF THE CASE

Appellant, hereinafter referred to as "Mitchell" is a corporation engaged in the business of transporting *building materials* and *heavy machinery* by motor vehicle in interstate commerce as a common carrier operating over irregular routes within the Pacific Northwest.

Mitchell's operation is authorized by several certificates of public convenience and necessity issued by the Commission and acquired by Mitchell in 1949. The particularly pertinent certificate was originally issued to Mitchell's predecessor in 1939 in *Lundstrom Common Carrier Application* (1939), 13 M.C.C. 491 which authorized the transportation of:

> "*Building materials and heavy machinery*, including heavy steel girders, steel pipe, boilers, water works supplies and plumbing goods, cement, cast stone, wooden pipe and tanks (set up or knocked down), and fabricated steel reinforcing bars, and other commodities of similar nature."

At that time it appeared that the Commission intended the words "*Building materials and heavy machinery*" in the above quoted commodity description to be used as generic terms.[1]

Ever since 1949 Mitchell has been transporting electric *cable* under its authority to transport "building materials" and large and heavy electric *transformers* and *regulators* under its authority to transport "heavy machinery, including . . . boilers . . . and other commodities of similar nature."

One of several representative shipments of electric *cable* was a shipment on September 24, 1958 for the Aluminum Company of America from Vancouver, Washington to Idaho Power Company at Brownlee, Oregon consisting of four reels of electric cable, steel cored, weighing 39,339 pounds.[2]

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[1] In *Lundstrom Common Carrier Application* (1939), 13 MCC 491 at 503, the report of the Commission which authorized issuance of Mitchell's certificate in reference to the specific commodities mentioned as being included in "Building materials and heavy machinery" stated:

> ". . . However, this latter group should normally fall within the generic term of building materials or heavy machinery. The real need which applicants are ably equipped to fulfill is in the transportation of these various heavy commodities from points of origin to construction points."

[2] ALCOA for the past ten years has been manufacturing electric cable at its Vancouver plant and for all of this time, Mitchell has

One of several representative shipments of large and heavy electric *transformers* and *regulators* was a shipment on April 26, 1960 from Portland, Oregon to Pacific Power & Light Co. at Buffalo, Wyoming consisting of two uncrated regulators weighing 7,340 pounds and three uncrated transformers weighing 16,620 pounds.[3]

In respect to all shipments Mitchell made no investigation and did not know at time of the transportation, the actual intended use of the *cable*, *transformers* or *regulators* being shipped.

On October 21, 1960 the Commission upon its own motion instituted an investigation pursuant to authority of Sections 204(c) and 212(a) of the Interstate Commerce Act, 49 U.S.C. § 304(c) and § 312(a) to determine whether Mitchell had been transporting commodities not authorized by its certificates of public convenience and necessity. As a result of this investigation the

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been hauling it. This cable is usually shipped on reels of various sizes, the largest reel being 84 inches in diameter and 4 feet thick, with 5,000 to 10,000 feet of aluminum cable on the reel weighing up to 10,000 pounds. The large reels are transported by Mitchell upon flat-bed motor vehicle equipment and are loaded and unloaded with special equipment consisting of either cranes or fork-lift trucks. This cable is normally used in or made to lead into buildings or power plants. It is transported to power companies, wholesalers and retailers, who in turn sell it to construction and industrial companies to use in the installation of electrical systems. This cable is customarily referred to in the trade as "building" or "construction" material: the words "building" and "construction": being used interchangeably as the words are used synonymously. When motor carriers pick up this cable to transport ALCOA cannot always advise the carrier exactly as to what type of project the shipment may be going.

[3] These transformers are quite often so large and heavy as to require low-bed motor vehicle equipment to haul and special equipment such as cranes to load and unload. They are used both inside and outside of buildings.

Commission on September 27, 1962 issued its report and order finding that with respect to the above representative shipments Mitchell had transported them beyond its authority and in violation of Section 206(a) of the Interstate Commerce Act, 49 U.S.C. § 306(a) and ordered Mitchell to cease and desist. Mitchell's petition for reconsideration of the Commission's cease and desist order was denied by order dated April 8, 1963.

By its order of September 27, 1962 the Commission found that the electric *cable*, even though contained within its own list of building materials[4] could not be transported by Mitchell if at time of transportation Mitchell had reason to believe its intended use was to be other than in the construction or repair of a building as distinguished from some other type of structure such as a bridge, power transmission line or airport. It further found in this respect that because the freight bill named a power company as consignee that Mitchell, therefore, had "some notice" that it was "highly unlikely" that the electric *cable* picked up for transportation from ALCOA's Vancouver, Washington plant had its intended future use for the repair or construction of a building.[5]

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[4] In 1952 after full hearing and study the Commission in *Descriptions in Motor Carrier Certificates* (1952), 61 M.C.C. 209, set forth in Appendix VI of its report a list of articles which motor carriers had in the past transported and which custom and usage of the trade considered to be building materials. Included on this list is: "Cable, electric" and "Cable clamps and joints".

[5] In case at bar the Commission in its report and order stated:

> " . . . It goes without saying that a carrier may not transport such listed commodities, or any commodity, as a building material, if it has actual knowledge that they are not to be

As to the *transformers* and *regulators*, the Commission in its order found that they were not heavy machinery. It brushed off any real interpretation of the above quoted commodity description by the clearly erroneous conclusion:

> ". . . Obviously, all of the commodities listed following 'building materials and heavy machinery', including 'other commodities of similar nature' must be either building materials or heavy machinery." (Sh. 13)

To further frustrate Mitchell, the Commission in its order found that Mitchell could transport transformers and regulators as "construction material" instead of "heavy machinery" but then only if Mitchell ascertained at the time of transportation that the intended future use of such was not to *repair* something as distinguished from originally constructing something.[6] It is

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used as building materials. If respondent did not actually know what use was to be made of the involved . . . cables, we believe that it should have known that it was highly unlikely that . . . electric power companies, . . . would use them as building materials. We shall not attempt, on this record, to delimit what constitutes "some notice" to a carrier that listed commodities may not be intended to be used as building materials, but at the very least, such notice definitely would exist if it is apparent, as is the case here, that a particular shipment is destined to a class or type of consignee who does not normally use or deal in building materials." (Sh. 7)

[6] The Commission in its report stated:

" . . . Construction materials, as used in motor-carrier operating authorities, are materials which at the time of transportation are, without further processing or manufacture, in a form and condition to be used in the construction, but not repair, of buildings and other structures or finished products of construction projects, are to become permanent parts of such structures or products of construction projects, and which are at the time of transportation intended with reason-

no satisfaction to Mitchell to be required to limit transportation of *transformers* and *regulators* to "construction materials" as its "heavy machinery" authority is more extensive territorial-wise than its "construction material" authority.

This action was commenced by Mitchell in the United States District Court for the District of Oregon to enjoin and set aside the findings, conclusions and order of the Interstate Commerce Commission. The case was heard on the record before the Commission and now before this Court. The District Court as especially constituted pursuant to 28 U.S.C. § 2325 and § 2284 comprised the Honorable: Barnes, Circuit Judge and Solomon and Kilkenny, District Judges.

The District Court's opinion (App. A) indicated that in deciding adversely to Mitchell it:

(1.) Avoided a critical analysis of the certificate which Mitchell had sought as to whether such language could support an intended use connotation by merely concluding that the Commission's use of its "intended use" test[7] is no longer open to question; and

(2.) Held in respect to the transportation of electric

able certainty to be so used." (Sh. 9)

" . . . However, the electric cables, transformers, and regulators have been moved to power and light companies, and if respondent affirmatively establishes that they are at the time of transportation intended to be used in the construction of new power transmission lines and to be permanent parts thereof, they may be transported as 'construction materials' ". (Sh. 10)

[7] In essence, the "intended use" test refers to a commodity description technique employed by the Commission in which the commodities which the carrier is authorized to transport are defined in terms of their intended future use.

transformers and *regulators* under the authority: "heavy machinery, including . . . boilers . . . and other commodities of similar nature" that the Commission interpretation was entirely consistent with logic and common sense. The Commission's interpretation was that even if transformers and regulators might be similar to either heavy machinery or a boiler they were not heavy machinery as defined by the Commission and hence could not to be transported, irrespective of the description which authorized transportation of "commodities of similar nature."[8]

(3.) Did not even comment upon the nonsense that Mitchell could not transport "construction materials" if their intended future use was to repair instead of originally construct something.

(4.) Held that the Commission's "some notice" test was within its power.

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[8] Commission's interpretation which the District Court found to be consistent with logic and common sense is set forth in Note 3 of the District Court's opinion (App. A) and reads:

> "The final description remaining for consideration under which respondent contends that it may transport the involved cables . . . transformers and regulators, is the underscored portion of the following description: 'building materials and heavy machinery, including heavy steel girders, steel pipe, boilers, water works supplies and plumbing goods, cement, cast stone, wooden pipe and tanks (set up or knocked down), and fabricated steel reinforcing bars, and *other commodities of similar nature*. Obviously, all of the commodities listed following 'building materials and heavy machinery', including 'other commodities of similar nature,' must be either building materials or heavy machinery, and since, as we have stated above, none of the involved commodities now under consideration are either building materials or heavy machinery, respondent may not transport them under the underscored part of the above description."

On this appeal Mitchell contends that reading the plain language of a certificate's commodity description and giving effect to it is a matter of law. Further, that the District Court's conclusions as well as the Commission's conclusions in such respects are each and both clearly erroneous.

QUESTIONS ARE SUBSTANTIAL

The basic issue of this appeal is the giving of a proper meaning to the following commodity description in Mitchell's certificate:

> "*Building materials and heavy machinery*, including heavy steel girders, steel pipe, boilers, water works supplies and plumbing goods, cement, cast stone, wooden pipe and tanks (set up or knocked down) and fabricated steel reinforcing bars, and other commodities of similar nature."

The substantiality of the federal question involved in this appeal may be seen by comparing the above commodity description found in Mitchell's certificate with the description "stock in trade of drug stores" which this Court construed in *Nelson* v. *United States*, 355 U.S. 554. It is the marked difference between these two descriptions and the reasoning of this Court in *Nelson* which justified approval of the intended use test in *Nelson* and which requires disapproval in the case at bar.

That which this Court clearly held in *Nelson* but which the Court and Commission below seem not to have understood is that the Commission's intended use

test was approved in *Nelson* only because the language "stock in trade of drug stores" fairly lent itself to a reasonable inference that the only commodities intended to be authorized for transportation were those intended for use in drug stores. In the *Nelson* case the Commission's intended use test was approved as a technique only because it was used as a means of describing and not of determining what the language in the pre-existing certificate was intended to mean. This Court likened "stock in trade of drug stores" to descriptions such as "Packing house supplies" and "Contractors' equipment". It refused to equate such description with the so-called "such as" type of commodity descriptions, i.e. "such commodities as are dealt in by wholesale and retail hardware stores".

The contrary is true with respect to the language "building materials and heavy machinery . . ." found in Mitchell's certificate. In fact, the remarkable similarity of Mitchell's description with the "such as" descriptions which this Court rejected in *Nelson* becomes apparent by substituting "such as" for the word "including" in Mitchell's description so that it reads:

> "Building materials and heavy machinery, *such as* heavy steel girders . . . waterworks supplies . . . boilers . . . and other commodities of similar nature."

Only a few days ago this Court in *United States* v. *J. B. Montgomery* (March 23, 1964), No. 66, — U.S. — held invalid the Commission's imposition of an "origin and destination" restriction upon a "such as" type of com-

modity description. There, the Commission placed its restriction in a certificate at the time of converting it from a contract carrier's permit. Here, the same unlawful result has been accomplished through the devious device of imposing its intended use test upon language of a description which does not fairly lend itself to any intended use connotation.

In light of the *Nelson* case the Court and Commission below were clearly erroneous in two fundamental respects in their endeavor to give ordinary meaning to ordinary language.

First, they sanctioned an intended use connotation to "building materials and heavy machinery" when such description is utterly lacking of any words to which might reasonably attach an inference of an intent to limit transportation of commodities to a specific place such as a drug store in "stock in trade of drug stores" or to a general class of persons such as contractors in "Contractors' equipment". It is the absence of this essential wording which results in the Commission using its intended use test to determine rather than merely describe that which the certificate declares. It is this kind of tampering with certificates under guise of interpretation which the Commission was forbidden to do by this Court in the *Nelson* case.

Second, the Court and Commission below ignored the plain fact that when the Commission in 1939 issued Mitchell's certificate it used the words "building materials and heavy machinery" in a broad generic sense free of any intended use connotation. The Commission in

1939 not only so stated in its report which gave birth to the description[9] but the very words of the description taken as a whole compels such construction. Since it is impossible to draw any inference of intended use from "heavy machinery" that term when placed in conjunctive juxtaposition with "building materials" to form the description heading makes rather anomalous any attempt to draw an intended use connotation from one term and not the other. Most compelling, however, is the fact that in this description the Commission undertook to spell out by specific commodities and classes of commodities that which it intended to be included in its use of "building materials and heavy machinery". In doing so, the Commission unmistakably intended "building materials" to be used in the generic sense and synonomously with "construction materials" if used in its generic sense. The language forecloses any idea that the words "building materials" were intended only to mean those commodities intended to be transported to a building site and not otherwise even if they were within the class of commodities well understood to be building materials. This is seen by observing that the description named "heavy steel girders", and "fabricated steel reinforcing bars" both of which have always been considered by the Commission to be 'construction" and not "building" material.[10] Also named were: "waterworks

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[9] See footnote 1.

[10] This follows from the fact that neither "heavy steel girders" or "fabricated steel reinforcing bars" are found in the Commission's list of building materials in its *Descriptions* case, 61 M.C.C. 209 at 279. Those articles not on the "building material" list are usually regarded as "construction material" as no list of "construction

supplies" which clearly are not materials for use in buildings if one takes for example a shipment of fire hydrants. All the language in the description makes sense if "building materials" is considered to be a generic term. To impose upon "building material" a meaning restricted to materials at the time being transported only for use in a building and not any other kind of structure is to give no effect whatever to the remaining language which was used for the very purpose of making plain the intended broad meaning to be given to "building materials and heavy machinery".

The same is true in the case of transporting heavy electric *transformers* and *regulators* as "commodities of similar nature" to either "heavy machinery" or a "boiler" which was expressly included in the description. In the Court below the Commission took the position that all words of the description following "building materials and heavy machinery" could mean no more than what the Commission of late has declared "building materials and heavy machinery" to be. As a consequence, even assuming *transformers* and *regulators* to be similar to either "heavy machinery" or a "boiler" they could not be transported because they are not presently regarded by the Commission to be "building materials or heavy machinery". In short, the Commission has dogmatically undertaken to hold that Mitchell may trans-

material" has been compiled, *Ace Lines, Inc. Interpretation of Certificate* (1960), 78 M.C.C. 523, 529. In *Lundstrom Application* (1939), 13 M.C.C. 491, 499, Mitchell was authorized to transport "heavy steel girders" because a prospective need was shown to move such to the Shasta Dam within 150 miles of the Oregon-California border.

port only those things which it declares to constitute building materials and heavy machinery" irrespective of the broad illustrative and amplifying language of Mitchell's commodity description. Since the hearing in the Court below the Commission, informally through its Director of Motor Carriers has ruled that "boilers" are no longer heavy machinery.[11] Applying such a view to the Commission's interpretation of Mitchell's description results in forbidding Mitchell to transport a boiler even though its commodity description expressly declares that it may do so. This should be sufficient to indictate that the Commission is undertaking to restrict motor carriers in their operations by edict and in disregard of their most valuable and sacred certificates of public convenience and necessity. These are some of the reasons why the Court below was clearly erroneous in finding that the Commission's interpretation of the controverted language was entirely consistent with logic and common sense.

The "Some Notice" Test

In recent years the Commission has been on a "test" spree which in many instances has created turmoil in

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[11] In *C & H Transportation Co., Inc.*, Docket No. MC-83539, application for temporary authority, the applicant in its reply brief quotes from letter dated December 13, 1963 to it from the Director of Bureau of Motor Carriers as follows:

> "In reply to your letter of November 20, 1963, it is my informal opinion that a motor carrier authorized to transport 'heavy machinery and related parts' may not transport boilers used in connection with heating plants and also used for a power source for steam operated equipment and steam operated electrical generators. In my opinion such boilers are not machinery or machinery parts."

the motor carrier industry by making confusing and cumbersome the guidelines in which motor carriers must operate without having their certificates revoked and their businesses destroyed.[12]

The ultimate in confusion and cumberness of its many tests has culminated in the case at bar by the Commission giving birth to its "some notice" test. Such "test" arises by the Commission holding that at the time Mitchell picked up electric *cable* at its place of manufacture for the purpose of transportation it should have affirmatively investigated and determined, at peril of losing its certificate, that the consignee to whom the electric *cable* was to be delivered intended to use it in the construction or repair of a building. This duty of determining intended use was imposed upon Mitchell in the case of electric *cable* because the freight bill which named a power company as consignee, according to the Commission, gave "some notice" to Mitchell that it was "highly unlikely" that the named electric power company intended to use the electric cable in connection

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[12] A pattern of vaguely described interpretative "tests" have emerged from the Commission which all relate to its "intended use" test, namely: A carrier may transport building materials without inquiry of intended future use if the commodity is "suitable for virtually no other use", *Albert Greenberg Investigation* (1951), 52 M.C.C. 387; or if it appears that the commodity's "predominent use" is for a building, *Point Pleasant Transportation Company Petition* (1953), 61 M.C.C. 666; and if "no further processing or manufacture" of the commodity is required, *Roy Stone Transfer Co.* (1957), 71 M.C.C. 651; or if the commodity is on the Commission's list as a building material and the carrier at time of transportation has no "knowledge" of its intended use not being for a building, *Ace Lines, Inc. Investigation and Revocation* (1960), 78 M.C.C. 523.

with a building.[13] Except for this "some notice" which the Commission refused to define, Mitchell could have transported the electric *cable* without such investigation because it appeared on the Commission's building material list. *R.N.B. Converse Extension—Construction Materials* (1956), 66 M.C.C. 607.

The practical effect of the Commission's "some notice" test is to keep Mitchell's certificate in constant jeopardy of being revoked. During every hour of every day Mitchell's compliance with the present cease and desist order will depend upon how well, if at all, its many truck drivers, who pick up for transportation each day a variety of building materials, might scrutinize shipping documents and correctly decide whether the name of the consignee stated thereon has such significance as to give "some notice" so as to require an investigation through the consignor to determine what the consignee's intended use might be for the particular shipment.

Consequently, it was clearly erroneous for the Court below not to have held that the "some notice" test which the Commission set up for Mitchell as a standard for compliance with its cease and desist order was so vague and uncertain as to deprive Mitchell of due process of law as guaranteed by the Fifth Amendment. *United States* v. *Cohen Grocery Co.* (1921), 255 U.S. 81; *Lanzetta* v. *New Jersey* (1939), 306 U.S. 451. In fact, in *Ace Lines, Inc.* v. *United States* (1960), 197 F. Supp. 591 that District Court reluctantly upheld a "knowledge" test as to intended use of building mate-

[13] The Commission's report in this regard is quoted in footnote 5.

rials only because the attorney for the Commission represented to the Court that the Commission meant "actual knowledge" and not "constructive knowledge" when it used the word "knowledge".

The "Repair" Test

What is likewise arbitrary and capricious is the Commission's holding that Mitchell may not transport electric *cable*, *transformers* and *regulators* as "construction material" if its intended use is only to repair a structure as distinuished from originally constructing a structure.[14] No support for such a "test" can be found in the commodity description "construction materials" with or without any intended use connotation. It's restriction has no reasonable relationship to the regulation of motor carriers. The Court below did not pass on this point though it was urged as a reason to enjoin enforcement of the cease and desist order.

What makes this "test" mischevious is that now power companies, who for years have depended upon "construction material" haulers such as Mitchell to move large and heavy electric *cable*, *transformers* and *regulators* to off-route power transmission lines in order to effect repairs will find themselves without a needed transportation service. Even the Commission should know that the regular-route general commodity motor carriers now being the only carriers left with authority to perform this specialized service cannot or will not do so.

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[14] The Commission's report in this regard is quoted in footnote 6.

This Appeal Important

There is more than meets the eye in this seemingly simple battle of semantics. This case persuasively indicates that the Commission through using its intended use test ostensibly as a technique for interpreting certificates issued in yester-year is in reality using such technique to fashion a uniformly restrictive groove of operation for the specialized commodity carriers in utter disregard of the rights of such carriers spelled out in plain language in each of their respective certificates of public convenience and necessity. This policy not only constitutes a clear invasion of a motor carrier's rights guaranteed by the due process clause of the Fifth Amendment but is also repugnant to the policy of Congress set forth in the proviso of § 212 of the Interstate Commerce Act, 49 U.S.C. § 312 to the effect that the Commission may not interpret certificates into oblivion. Since the Commission proclaims this Court's decision in the *Nelson* case as authority to employ tests as an interpretative technique it appears that it has mis-construed the holding in *Nelson* as sanctioning a *carte blanche* use of tests. This is a particular reason for this Court to speak again on the subject by hearing this appeal.

Raised for the first time on this appeal is the question of the validity of the Commission's newly created "some notice" and "repair" tests concocted by it in an endeavor to make workable its unworkable intended use test. On their surface, these later tests are so vague,

uncertain and impractical of application as to demonstrate violation of due process as guaranteed by the Fifth Amendment. By the proviso of § 212 of the Interstate Commerce Act, 49 U.S.C. § 312 Congress made a cease and desist order a condition precedent to the revocation of a motor carrier's certificate. Unless the judgment of the Court below is reversed the Commission now has such a cease and desist order. This order, much like the sword suspended by a single hair over the head of Damocles will forever hang over Mitchell. One slip on the part of Mitchell or one of its truck-drivers in not properly evaluating the name of a consignee on a freight bill as giving "some notice" of the likelihood of an illegal intended use of a shipment can mean automatic suspension or revocation of Mitchell's certificate. The same is true if Mitchell should fail to discover that any one of the many shipments of construction material which it transports each day should happen to go to the repair of something instead of the original construction of something. As incredible as all of this may seem to this Court it remains an awesome fact with which Mitchell must live. Mitchell's business is now on the "chopping block" just as surely as is the neck of next Thanksgiving's Day turkey.

The learned judges of the District Court below erred not so much in having a different understanding from Mitchell of the plain meaning of plain language but rather in having too strictly applied the principle of review to the effect that the soundness of Commission reasoning cannot be questioned by a court. The very

fact that the judicial review of a Commission order by the District Court is at best down a narrow corridor is reason itself for this Court to hear this appeal to determine, if nothing else, whether the Court below so narrowed the corridor as to choke off all review. Unless this appeal is heard Mitchell will have had no appellate review of the judgment below. Having shown a substantial question this Court should note probable jurisdiction because Congress thought it so important that appellate review be given in an action against the Interstate Commerce Commission that it provided for a direct appeal to this Court, the highest in the land. 28 U.S.C. § 1253.

Unless the judgment of the Court below is reversed Mitchell at best stands to have its traffic heart cut from its motor carrier operation built upon many years of investment and toil and at worst, it stands to lose its entire business through revocation of its certificate for breach of a "some notice" or "repair" test both of which are impossible for it or any other motor carrier to understand or meet. But more than just the fate of Mitchell is at stake. We venture to estimate that there are literally hundreds of grand-father certificates of public convenience and necessity issued to small specialized commodity haulers throughout the Nation with all having commodity descriptions which in one way or another are comparable to the description in Mitchell's certificate. Whether aware of it or not, all of these other carriers who are similarly situated stand to live or die with Mitchell.

WHEREFORE, Appellant prays that this Court note probable jurisdiction, hear this direct appeal on its merits and reverse the judgment of the Court below.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

MITCHELL BROS. TRUCK LINES, a corporation, *Plaintiff*,	)	OPINION AND ORDER OF DISMISSAL
v.	)	
UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, *Defendants*.	)	CIVIL NO. 63-215

Before: BARNES, Circuit Judge, and SOLOMON and KILKENNY, District Judges.

KILKENNY, DJ:

Plaintiff is dissatisfied with, and challenges the validity of, the inclusion of the defendant Commission that certain of the commodities being transported by plaintiff are beyond the scope of its operating authority.

Plaintiff is authorized by its Certificates of Public Convenience and Necessity, as a motor common carrier of property, to transport, so far as here relevant, the following:

> "Forest *products* and *lumber*"
>
> "*Building materials* and *Heavy machinery*, in truckloads"
>
> "*Building materials* and *Heavy machinery*, including steel girders, steel pipe, boilers, water works supplies, and plumbing goods, cement, cast stone, wooden pipe and tanks (set up or knocked down), and fabricated steel reinforcing bars, and other commodities of similar nature."

"*Machinery, contractors' equipment,* and *construction materials*"

and

"*Heavy machinery* and *Building materials*".

Claiming authority under its certificates, plaintiff has been transporting electric cable, dry glue, glue stock, furfural residue, wood veneers, transformers, and regulators.

Plaintiff is an Oregon corporation engaged in the business of transporting certain building equipment, materials and machinery. It is what is commonly known as a Class One, irregular route, common carrier operating in the Pacific Northwest and California. Its principal place of business is Portland, although it has offices and facilities in Seattle, Washington, Medford, Oregon, and Crescent City, Redding and San Pablo, California. It operates from 250 to 275 trucks and trailers, mostly flatbeds.

Pursuant to the authority granted by 49 U.S.C. §§ 304(c) and 312(a), the Commission, on its own motion, instituted an investigation to determine whether plaintiff had been transporting commodities not authorized by its certificates, in violation of § 306(a) of the Act. A hearing was held before a Commission examiner. Following the hearing, the examiner found that the plaintiff was transporting certain of the above commodities without authority.[1] Exceptions to the recommended re-

[1] The examiner concluded that plaintiff's "heavy machinery" authority authorized transportation of transformers, regulators and electric cable.

port and order were filed by the plaintiff and another carrier, Ace Lines, Inc., the latter being permitted to intervene. On September 27, 1962, the Commission issued its report and order finding that the transportation of the above mentioned commodities, with the exception of wood veneers, were not authorized by plaintiff's certificates, but that the commodity description "construction materials" does, under certain conditions, authorize the transportation of electric cable, transformers and regulators. An order was entered requiring plaintiff to cease and desist from the unauthorized transportation. 91 M.C.C. 267. Petitions for reconsideration were denied by the Commission, acting as an appellate division, on April 8, 1963.

A few guide lines will be of assistance in arriving at a proper conclusion.

The fact that the Commission may have reached a different conclusion than that recommended by its examiner is of no importance. The Commission has a legal duty to arrive at its own conclusion. *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933); *Baltimore & Ohio Ry. Co.* v. *United States*, 298 U.S. 349 (1936).

Courts are not concerned with the soundness of the Commission's reasoning or with the wisdom of its decisions. *Virginian Railway* v. *United States*, 272 U.S. 658 (1926); *Sims Motor Transport Lines* v. *United States*, (N.D. Ill. 1959), 183 F. Supp. 113.

The proper interpretation and meaning of the application under a given state of facts, and the effect thereof

under the protection of the "grandfather" clause, has been reserved for the Commission. *Noble* v. *United States*, 319 U.S. 88 (1943). The construction of a "grandfather" permit by the Commission is controlling on the Courts. *Dart Transit Co.* v. *Interstate Commerce Commission*, 110 F. Supp. 876, aff'd. 345 U.S. 980.

In general, the scope of transportation permitted by a certificate, is for the Commission and, will not be overturned by the Courts, unless arbitrary or clearly erroneous. *Nelson, Inc.* v. *United States*, 355 U.S. 554 (1958); *Simpson* v. *United States* (S.D. Ia. 1961), 200 F. Supp. 372, aff'd. 369 U.S. 526.

The judicial function is exhausted when it is found that there is a rational basis for the conclusions reached by the administrative body. *Mississippi Valley Barge Lines Co.* v. *United States*, 292 U.S. 282 (1934).

On the other hand, it is well recognized that the Commission does not have power to change or modify a motor carrier's certificate under the guise of interpretive action. *Nelson, Inc.* v. *United States*, supra, nor can the order of the Commission be upheld if it is clearly erroneous as that phrase is used in the *Nelson* decision. 5 U.S.C. § 1009(e) invalidates the Order if it is either (1) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; or (2) contrary to constitutional right, power, privilege or immunity; or (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights; or (4) without observance of procedure required by law; and (5) unsupported by substantial evidence in any case . . . reviewed

on the record of an agency hearing provided by statute . . . *Ace Lines, Inc.* v. *United States*, (S.D. Iowa, 1960) 197 F. Supp. 591; *Minneapolis and St. Louis Railway* v. *United States*, 361 U.S. 173.

A principal contention of the plaintiff is that the final phrase in the commodity description—"and other commodities of similar nature" grants plaintiff authority to transport, in addition to building materials and heavy machinery, the specified list of commodities and "other commodities of a similar nature" to building materials and heavy machinery. Under this construction, which it claims to be proper, the plaintiff argues that it may transport such items as cable, veneers, transformers and regulators on the theory that, although they do not technically fall within the term "building materials" or "heavy machinery"[2] they are "of a similar nature" to building materials and heavy machinery. The answer of the Commission to this contention is entirely consistent with logic and common sense.[3]

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[2] An alternative contention is that the named commodities actually fall within one of those terms, will be discussed later.

[3] The final description remaining for consideration under which respondent contends that it may transport the involved cables, veneers, transformers and regulators, is the underscored portion of the following description: "building materials and heavy machinery, including heavy steel girders, steel pipe, boilers, water works supplies and plumbing goods, cement, cast stone, wooden pipe and tanks (set up or knocked down), and fabricated steel reinforcing bars, and *other commodities of similar nature*." Obviously, all of the commodities listed following "building materials and heavy machinery," including "other commodities of similar nature," must be either building materials or heavy machinery, and since, as we have stated above, none of the involved commodities now under consideration are either building materials or heavy machinery, respondent may not transport them under the underscored part of the above description.

Manifestly, this conclusion of the Commission, with all of its expertise on the subject, is not clearly erroneous.

On this point, plaintiff argues that the Commission's interpretation narrows the grant of the authority to which it was entitled by reason of its "grandfather" operations and which its "grandfather" certificates was intended to cover.

If this is a fact, plaintiff should petition the Commission to re-open the "grandfather" proceeding. *Nelson, Inc.* v. *United States*, supra. That plaintiff recognizes this doctrine, as taught in *Nelson*, is demonstrated by the fact that plaintiff filed a petition to re-open the proceedings in which two of its other certificates were issued, in order to show that it was entitled to a larger grant than indicated on the face of its certificates.

Another thrust of plaintiff's argument is that the certificate should be treated as authorizing a complete "heavy hauling" service. By this method, it would justify its past transportation of electric cable, which it readily concedes cannot be classified as "machinery". Again the Commission, in its wisdom, found no merit in this contention.[4] The conclusion of the Commission is

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[4] " . . . Respondent's contentions that the term "heavy machinery" refers to a complete heavy hauling service is without merit. Although "heavy machinery" and "commodities the transportation of which, because of size and weight, require the use of special equipment" have both been referred to as commodity descriptions of "heavy haulers" and although it has been found, in proceedings in which modification of "grandfather" authority was sought and granted, that a carrier authorized to transport only "heavy machinery" should have been, and would for the future be, authorized to perform a complete heavy hauling service, the

adequately supported by *Hove Truck Lines* v. *Eldon Miller, Inc.*, 63 M.C.C. 753, 756 (1955).

As another alternative, the plaintiff urges that "machinery" includes any type of mechanical appartus or device and that "transformers" and "regulators" should be so treated. The Commission interpreted the term "machinery", as used in the certificate issued by it, to embrace only mechanical devices which have not, through manufacturing or assembling processes, been transformed into a new and different object which is itself considered to be a separate and distinct commodity. Under such an interpretation a commodity such as automobiles, airplanes, refrigerators, and farm tractors, are not authorized by a certificate permitting the transportation of "machinery", and that restrictive interpretation of "machinery" has received the approval of the courts as early as 1948. *Black* v. *Interstate Commerce Commission*, 167 F.2d 825 (5 Cir. 1948), cert. den. 335 U.S. 818; *Converse* v. *United States*, 109 F. Supp. 807 (N.D. Calif. 1953); *Clarke Transport Co. Extension — Farm Tractors*, 62 M.C.C. 555 (1954). Such an interpretation had been placed on "machinery" long prior to the time plaintiff commenced the hauling of cable, transformers and regulators. In line with the above decisions, the Commission decided that transformers and regulators did not fall within the description "machinery",

two commodity descriptions under consideration are not synonymous. They are analogous, but any commodity transported under the description "heavy machinery" must be machinery. . . . See *Dayton Transportation Corp. Ext. - Iron and Steel Articles*, 79 M.C.C. 713, 715, *C&H Transp. Co., Inc., Clarification of Authority*, 88 M.C.C. 87, 94, and *Sam Gottry* case, *supra* (86 M.C.C.) at pages 710 and 711.

but on the other hand, such articles should be considered as "electrical" appliances, equipment and parts.

Plaintiff attacks the Commission's employment of the "intended use test", in connection with the construction of plaintiff's certificates. That such a test may be used by the Commission is no longer open to question. *Nelson, Inc.* v. *United States*, supra; *Converse* v. *United States*, supra, (mining and construction materials, equipment and supplies); *Ace Lines, Inc.* v. *United States*, 197 F. Supp. 591 (S.D. Ia. 1960) (building materials). Likewise, the Commission's outline of the circumstances under which plaintiff may accept a shipment, without investigating to ascertain the actual intended use of the commodities, was a valid exercise of the Commission's discretion. The Commission, in issuing this order, was within its statutory power and authority. On this question, the Commission decided that commodities which were ordinarily used as "building materials" or "construction materials" (i.e. commodities on the so called "building material list" established by the Commission in descriptions of motor carrier's certificate, 61 M.C.C. 209) may be accepted for shipment by the plaintiff without making any investigation as to the actual intended use thereof, provided that plaintiff does not have knowledge that another use is intended. On the other hand, where the shipment is destined to a type of consignee which does not normally use building or construction materials, as so defined, the carrier is deemed to have notice that another use is probably intended and cannot accept the shipment, unless subsequent investigation reveals the commodities to be within the scope of

its authority. We conclude that the Commission in making this order did not go beyond the scope of its statutory authority. *Ace Lines, Inc. v. United States*, supra, relied on by the plaintiff, does not support its position. The position of the Commission has judicial support. *Pierce Auto Freight Lines* v. *Converse*, 54 M.C.C. 447 (1952) sustained *Converse* v. *United States*, supra. *Contractors Transit, Inc.-Investigation and Revocation*, 78 M.C.C 347 (1958). The decision in *Ace Lines, Inc.* v. *United States*, supra, was thoroughly analyzed and discussed by the Commission at the time of making its decision.[5] *United Transport, Inc.* v. *United States* (W.D. Okla. 1962), 214 F. Supp. 34, and *Refrigerated Transport Co.* v. *United States* (N.D. Ga. 1963), 214 F. Supp. 536, are of no help to plaintiff. They did not involve the intended use test.

Plaintiff concedes that the principles of laches and estoppel cannot be asserted against the Commission. *Sims Motor Transport, Inc.* v. *United States* (N.D. Ill. 1959), 183 F. Supp. 113, 119.

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[5] "Respondent and Ace rely heavily on *Ace Lines, Inc. - Investigation and Revocation*, 78 M.C.C. 523, wherein division 1 stated that any commodity included in the building materials list may be transported under authority to transport "building materials" without specific inquiry as to its intended future use as provided the carrier does not at the time of movement have knowledge of an intended use other than as a building material . . . ." On review of this case, the court stated in *Ace Lines v. United States*, 197 F. Supp. 591, that although the Commission did not use the word "actual" preceding the word "knowledge", it was satisfied that the Commission meant actual knowledge to be the type of knowledge required and that it was "quite certain that the Commission would not depart from the actual knowledge standard without making a specific statement to that effect and assigning reasons for the change." 91 M.C.C. 269-270.

We have carefully considered the other points and contentions made by plaintiff. The rulings of the Commission thereon were neither arbitrary nor capricious. The Commission's findings, on each point raised by plaintiff, are supported by substantial evidence. To consider the weight of that evidence or the soundness of the reasoning by which the Commission reached its conclusions, is outside the province of this Court. *Interstate Commerce Commission* v. *Union Pacific Railway Co.*, 222 U.S. 541, 547; *Virginian Railway Co.* v. *United States*, supra.

The order of the Commission is affirmed and the complaint hereby dismissed.

DATED this 20th day of December, 1963.

STANLEY N. BARNES,
Circuit Judge
GUS J. SOLOMON,
District Judge
JOHN F. KILKENNY,
District Judge